83-444

Supreme Court, U.S.
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ALEXANDER L. STEVAS,

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LLOYD BALLIVIERO

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL PETITION BY PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT, THROUGH A SERIES OF RULINGS PREVENTING THE PETITIONER FROM CALLING VARIOUS DEFENSE WITNESSES AS WELL AS INTRODUCING RELEVANT DEMONSTRATIVE AND DOCUMENTARY EVIDENCE, DENIED THE PETITIONER HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF BOTH THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER THE TRIAL COURT, THROUGH A SERIES OF RULINGS RESTRICTING THE PETITIONER'S ABILITY TO CONDUCT A MEANINGFUL CROSS-EXAMINATION OF PROSECUTION WITNESS HINDELANG, VIOLATED THE PETITIONER'S RIGHTS TO DUE PROCESS OF LAW AND TO CONFRONTATION OF THE WITNESSES AGAINST HIM, AS GUARANTEED TO HIM BY THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

III. WHETHER IMPEACHMENT OF THE KEY GOVERNMENT WITNESSES AT TRIAL BY EVIDENCE OF PRIOR INCONSISTENT STATEMENTS CONCERNING MATTERS DIRECTLY RELATING TO THE FULFILLMENT OF THEIR PLEA AGREEMENTS WITH THE GOVERNMENT CAN BE CONSIDERED "COLLATERAL" MATTERS, WHERE THE SOLE ISSUE FOR THE JURY TO DECIDE WAS THE CREDIBILITY OF THESE WITNESSES.

IV. WHETHER A PROSECUTION WITNESS'S ACKNOWLEDGMENT THAT THERE EXISTS EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENTS MADE BY HIM PRECLUDES THE DEFENDANT'S RIGHT TO PRESENT SUCH EVIDENCE TO THE JURY UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND RULE 613 OF THE FEDERAL RULES OF EVIDENCE.

V. WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL AS TO THE FIRST COUNT OF THE INDICTMENT (CONTINUING CRIMINAL ENTERPRISE) WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE PETITIONER HAD OBTAINED SUBSTANTIAL INCOME OR RESOURCES FROM THE ENTERPRISE.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 198

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LLOYD BALLIVIERO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The petitioner, Lloyd Balliviero, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 2, 1983.

OPINION BELOW

The opinion of the Court of Appeals in United States v. Lloyd Balliviero, 708 F.2d 934 (5th Cir. 1983), appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 2, 1983. A timely petition for rehearing was denied on July 6, 1983. This Court's jurisdiction is therefore invoked under 28 U.S.C. § 1254(1). This application is beling filed within sixty (60) days of the denial by the Court of Appeals of the petition for rehearing, and is therefore timely under Rule 20 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISION INVOKED

This case involves the Fifth and Sixth Amendments to the United States Constitution, which provide that:

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

> informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves 21 U.S.C. 848, which provides that:

> (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescirbed in paragraph (2).
>
> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States--
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property

or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter--

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

> (d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURTS BELOW.

Petitioner, Lloyd Balliviero, was originally indicted on December 17, 1981. (R. 1-4). (The symbol "R" will be used to designate the Record on Appeal. The transcript of testimony is bound in Volumes I through XIII of the Record on Appeal. Testimony from these transcripts will be referred to by Volume and page number.) On February 12, 1982, a nine count superceding indictment was filed in the United States District Court for the Eastern District of Louisiana,

charging the defendant with one count of engaging in a continuing criminal enterprise; one count of conspiracy to possess with intent to distribute marijuana; three substantive counts of possession with intent to distribute marijuana; one count of conspiracy to import marijuana; and three substantive counts of importation of marijuana. (R. 136-140).

A jury trial was held on April 12-28, 1982, before the Honorable Morey L. Sear. (Vols. I-XIII). The jury found petitioner guilty as charged as to all nine counts of the indictment. (R. 385-386).

On June 16, 1982, the petitioner was sentenced to a term of thirty (30) years imprisonment as to the first count of the indictment (continuing criminal enterprise), with a $100,000 fine. As to the second count (conspiracy to possess with intent to distribute marijuana), the petitioner was

sentenced to a concurrent term of five (5) years imprisonment and a $15,000 fine. As to counts three through five (possession with intent to distribute marijuana), the petitioner was sentenced to five (5) years imprisonment and a $15,000 fine, this sentence to rune concurrent to the sentences imposed on the first two counts. Finally, as to counts seven through nine (importation of marijuana) the petitioner was sentenced to terms of five (5) years imprisonment and a $15,000 fine as to each count, the sentences to run consecutive to each other and to those imposed in counts three through five, but concurrent to the sentences imposed in counts one, two and six. (R. 453).

On May 2, 1983, a three judge panel of the United States Court of Appeals for the Fifth Circuit affirmed the petitioner's conviction. A timely petition for rehearing was denied on July 6, 1983.

B. STATEMENT OF THE FACTS

The indictment herein centered around the one (1) year time period of June, 1979, thru May, 1980. It was the theory of the prosecution that during this period the petitioner, along with other individuals, was involved in a conspiracy to smuggle large amounts of marijuana into the United States, a conspiracy that culminated in the successful importation of three such loads in the early months of 1980. This alleged importation scheme took place in Louisiana, not far from New Orleans. As noted in the Fifth Circuit's opinion, 708 F.2d 934 (5th Cir. 1983), the importation scheme proceeded in the following manner. The Colombian grown marijuana was shipped from Colombia to a spot ten miles off the coast of Louisiana. There, a barge, pulled by a tugboat and accompanied by a crew boat, was sent out to the "mother ship". The barge would pull up to

the side of the ship and the transfer would begin. About eight hours later, the barge was loaded with marijuana and ready to begin the trip into the United States. The barge was towed back to the coast and then up a series of canals and rivers until it reached its destination: Hero Canal. There, under cover of darkness, the barge was unloaded, the bales of marijuana transferred to large trucks and the journey to distribute the marijuana throughout the country would begin.

The alleged role of the petitioner in this operation was pilot of the crew boat full of workers who off-loaded the marijuana. The petitioner also brokered deals for a man known under a variety of names including Ralph Jackson and Jack Wells, since the petitioner owned an area business named Central Marine Transport, Inc., and could make such large purchases without arousing suspicion. The petitioner testified that he

was simply a legitimate businessman, who happened to be involved unbeknownst to him in business deals with marijuana smugglers.

Basically, the prosecution's case was presented through two groups of witnesses. The first group of witnesses consisted of those "outside" of the conspiracy, i.e., those individuals who unknowingly supplied materials and services to the conspirators. The second group consisted of those "inside" of the conspiracy, i.e., co-conspirators Hindelang, Hart and Whitezell, who pursuant to plea agreements with the Government had decided to testify against the petitioner.

SUMMARY OF THE ARGUMENT

I.

The trial court unduly restricted the petitioner's right to present a defense in his own behalf. The three key witnesses for the prosecution were Hindelang, Hart and

Whitezell. The prosecution's case was intimately linked to their credibility. The trial court, however, would not allow defense counsel to call three D.E.A. agents as witnesses to testify as to previous inconsistent statements made to them by these key prosecution witnesses. The trial court's ruling that the credibility of these witnesses was collateral to the issues at trial was erroneous.

The trial court further restricted the petitioner in the presentation of his case by not allowing him to move into evidence the Government's Demand for Alibi. The trial court gave no reason for excluding this piece of documentary evidence. Indeed, this piece of documentary evidence would have provided circumstances from which the jury could infer that Whitezell's pre-trial statements concerning the dates of the loads of marijuana was inconsistent with his trial testimony.

The trial court would not allow the petitioner to introduce into evidence two video tapes. Both video tapes were not only relevant to rebut specific portions of the prosecution's case, but also lent credibility to the testimony of both the petitioner and the petitioner's witnesses. Although the trial court ruled that these video tapes were "prejudicial", no prejudice was ever specified nor did any exist.

Finally, the trial court refused to allow the petitioner to call as a witness in his behalf the lead detective on Jackson's murder. This detective's testimony was relevant as providing testimony from which the jury could draw the reasonable inference that Hindelang was responsible for Jackson's murder, thereby establishing a special motive for Hindelang's trial testimony against the petitioner.

II.

The trial court restricted the petitioner's ability to conduct a meaningful cross-examination of key prosecution witness Hindelang. Prior to trial a "secret" hearing was held upon Hindelang's Motion for Reduction of Sentence. The petitioner was denied access to the transcript of this hearing. This ruling impaired the petitioner's ability to conduct a meaningful pre-trial investigation as to the veracity of Hindelang's statements made in furtherance of his cooperation to the Government, designed to impeach Hindelang's credibility at trial. Furthermore, this secret hearing may have contained promises made to Hindelang in addition to the plea agreement letter sent by the Goverment to the petitioner.

The petitioner is entitled, under Brady, to have the contents of both this "secret" hearing and Hindelang's pre-sentence investigation made available to him.

III.

The evidence was insuffucient to establish that the petitioner had obtained "substantial income or resources" as a result of the marijuana transactions herein. Hindelang's testimony that Jackson had told him the petitioner was receiving twenty percent of all profits from the marijuana activities was unverified. Furthermore, the petitioner's statement that he had only received $66,000 from his "running the boat", was given an entirely innocent and unrebutted explanation by the petitioner.

Lastly, even if the petitioner received $66,000 for his participation in this case,

this cannot be considered "substantial income", for the prosecution's own witness, crew-member Whitezell, testified that he received $50,000 for his participation in this case.

ARGUMENT

I.

THE TRIAL COURT, THROUGH A SERIES OF RULINGS PREVENTING THE PETITIONER FROM CALLING VARIOUS DEFENSE WITNESSES AS WELL AS INTRODUCING RELEVANT DEMONSTRATIVE AND DOCUMENTARY EVIDENCE, DENIED THE PETITIONER HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF BOTH THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967), the Supreme Court of the United States spelled out the significance of the Sixth Amendment's right of the accused "to have compulsory process for obtaining witnesses in his favor." The Court noted that "the right to offer testimony of witnesses, and compel their

attendance, if necessary, is in plain terms the right to present a defense." The Sixth Amendment's policy is reinforced by the broad requirement of fundamental fairness that the duee process clause of the Fifth Amendment also guarantees. In Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049 (1973), the Supreme Court of the United States stated in the course of a discussion of due process "few rights are more fundamental than that of an accused to present witnesses in his own defense."

In the instant case, through a series of rulings preventing the petitioner from calling various witnesses as well as introducing relevant demonstrative and documentary evidence, the trial court denied the petitioner a fair trial as guaranteed to him by both the Fifth and Sixth Amendments to the Constitution of the United States.

A. THE TESTIMONY OF D.E.A. AGENTS EATON AND DONALD

It has long been the law that testimony concerning prior inconsistent statements of witnesses are admissible to impeach the credibility of such witnesses. See Palacios v. United States, 556 F.2d 1359 (5th Cir. 1977); Slade v. United States, 267 F.2d 8304 (5th Cir. 1959). This right of impeachment by extrinsic evidence of prior inconsistent statements has specifically been codified in Rule 613 of the Federal Rules of Evidence.

It has also long been the law that when the witness whose credibility is being attacked is the "star witness", or was an accomplice or participant in the crime for which the defendant is being prosecuted, the importance of such right is necessarily magnified. United States v. Mayer, 556 F.2d 245 (5th Cir. 1977); United States v. Brown, 546 F.2d 166 (5th Cir. 1977); Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966).

In such a case, the defendant has a right to explore "every facet of relevant evidence" pertaining to the witness's credibility. See United States v. Partin, 493 F.2d 750, 763 (5th Cir. 1974).

In the instant case, there can be no question that not only were accomplices Hindelang, Hart and Whitezell the "star" witnesses against the petitioner, but that the entire prosecution's case was intimately linked to their credibility. Simply stated, the only issue in this case was the credibility of these witnesses.

In this regard, the foundation for the testimony of all three "star" prosecution witnesses were the plea agreements they had entered into with the Government. Beginning with Hindelang, Hindelang testified that it was part of his plea agreement that he not only testify truthfully against the petitioner, but that he forfeit all assets of his that he had gained through his

marijuana related activities to the Government. (Vol. III, 158-160). On direct examination Hindelang testified that he had done just that.

On cross-examination Hindelang denied owning various properties within the United States as well as a multi-million dollar interest in a cable television company in Costa Rica, all of which were acquired through his marijuana dealings. Hindelang also denied making prior statements to D.E.A. Agent Donald admitting the ownership of these assets. (Vol. III, 163-166, 176).

When defense counsel attempted to call Agent Donald as a witness to impeach Hindelang's testimony by Hindelang's prior inconsistent statements to him concerning his ownership of these assets, the trial court ruled such testimony inadmissible. Counsel for the petitioner submitted sworn testimony of Agent Donald given at Hindelang's bond

hearing following his arrest in Miami. This testimony established Hindelang's prior statements to Donald concerning his ownership of these assets. (See Defense Exhibit 37).

According to the trial court, even though the requirements of Rule 613 had been met, Agent Donald's testimony was impeachment on a collateral matter: "Interest and bias, for example, are not collateral. Veracity is." (Vol. VIII, 11). The petitioner submits that the trial court's ruling herein evidenced a serious misapprehension of the law in this area.

Although the trial court was correct that the general rule is that impeachment is not permitted on collateral matters, it is clear that a matter can only be considered collateral when it "cannot reasonably be considered crucial or material to the issues on trial." United States v. Budzanoski, 462 F.2d 443, 445 (3rd Cir. 1972).

Thus, it is clear that "testimony which is offered to impeach the credibility of a key witness cannot ordinarily be viewed as collateral." Kines v. Butterworth, 669 F.2d 6 (3rd Cir. 1981); see also United States v. Uramoto, 638 F.2d 84 (9th Cir. 1980). This must be particularly true where, as here, the only issue at trial was the credibility of the Government's star witnesses.

By not allowing defense counsel to present the testimony of Agent Donald the trial court effectively took away from the petitioner his one and only opportunity to pove to the jury that Hindelang had lied to them while under oath at trial. More importantly, however, and independent of the fact that Hindelang had lied to the jury at trial, the trial court's ruling simultaneously denied defense counsel the opportunity to show the jury that Hindelang had directly violated both prongs of his plea agreement with the

Government, the very plea agreement that formed the basis of his testimony against the petitioner.

Certainly, what could be more relevant to the jury's assessment of Hindelang's credibility than the knowledge that not only had he lied to them under oath at trial, but that he had also been double dealing the Government?

With regard to Hindelang, the Fifth Circuit at p. 939 of its opinion, concluded that the failure of the trial court to allow the petitioner to cal D.E.A. Agent Donald to impeach Hindelang's credibility with testimony as to Hindelang's prior inconsistent statements to him concerning his ownership of various assets was not error. The basis of the Court's finding is two-fold. First, the Court found that this would have been impeachment on a "collateral matter". Significantly, nowhere in the Fifth Circuit's opinion is any

mention made of the long line of cases emanating from this Honorable Court that where the witness whose credibility is being attacked is a "star witness" or an accomplish or a participant in the crime, the importance of the right to effective impeachment is necessarily magnified. See United States v. Mayer, 556 F.2d 245 (5th Cir. 1977); United States v. Brown, 545 F.2d 166 (5th Cir. 1977); Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966). Thus, the Fifth Circuit's conclusion that the impeachment of a key Government witness on a matter directly relating to his credibility can be considered collateral to the issues at trial, appears contrary to the well established case law. Furthermore, not only does the Fifth Circuit ignore well established Fifth Circuit case law, but there is a conspicuous lack of any citation to case law from any other Circuit to support its conclusions. Indeed, the Fifth Circuit offers

no explanation or reasoned basis as to how it reached the conclusion that the impeachment of a Government witness on a matter directly relating to his credibility can be considered collateral to the only issue at trial, the credibility of such witness.

As previously mentioned, as a second basis for affirming the ruling of the trial court, the Fifth Circuit held that the trial court's ruling preventing the petitioner from presenting the testimony of Agent Donald did not prejudice the petitioner since Hindelang admitted that the agent had testified about his assets. Thus, the court seems to have adopted a unique, if not heretofore altogether unknown rule, that a prosecution witness's acknowledgement of extrinsic evidence can preclude a petitioner's right to present such evidence to the jury. This rule should be abolished before it spreads further.

Further, the Fifth Circuit's opinion again overlooked the following facts. It is

of no relevance that Hindelang merely admitted that Agent Donald had testified about his assets. What is relevant was the substance of Agent Donald's testimony. The substance of Agent Donald's testimony was that Hindelang had told him he owned various assets, an admission Hindelang never made at trial, and in fact vehemently denied. Thus, Agent Donald's testimony, if believed by the jury, would have established not only that Hindelang lied to them, but that he had lied to the Government as well by not turning over his ill-begotten assets to them as required by his plea agreement.

Finally, with regard to Hindelang, the Fifth Circuit's opinion overlooked the fact that insofar as a jury's ability to weigh credibility is concerned, Hindelang's admission that the agent had testified about his assets is no substitute for the live testimony of the agent himself.

The Sixth Amendment to the Constitution of the United States guarantees that every person charged with a crime shall have the right to compel witnesses in his own defense. Rule 613 of the Federal Rules of Evidence specifically provides that a defendant may call witnesses in his own behalf to impeach a prosecution witness by extrinsic evidence of prior inconsistent statements by that prosecution witness. Yet, the Fifth Circuit seems to have abrogated both the Constitution and Federal Rules of Evidence by adopting its own rule that if a prosecution witness acknowledges the fact that there may be extrinsic evidence conerning a prior inconsistent statement made by him, a defendant is no longer allowed to present such extrinsic evidence to the jury. Again, conspicuously absent from the Fifth Circuit's opinion is any case to support its conclusion. Indeed, the reasoning of the Fifth Circuit that the acknowledgement on the part of a

prosecution witness that there may be extrinsix evidence of a prior inconsistent statement by him removes any prejudice that may inure to a defendant from a trial judge's refusal to allow him to present such extrinsic evidence, is simply not logical.

The very basis for Rule 613 and allowing a defendant to present extrinsic testimony of a prior inconsistent statement of a prosecution witness is to allow a jury to compare the credibility of the witness who presents such extrinsic evidence to the credibility of the prosecution witness. If the jury, after having observed the demeanor of both witnesses, chooses to believe the defense witness that on a prior occasion the prosecution witness has given a statement inconsistent with his trial testimony, the jury may then choose not only to disbelieve the testimony of the prosecution witness as to that one particular point, but as to any or all of the rest of his testimony.

Further, on p. 938 of the Fifth Circuit's opinion, the Court characterized the petitioner's first point on appeal as maintaining that the District Judge impermissibly cut off his cross-examination of the Government's witnesses, which would have exposed the fact that the witnesses had lied in Court and were not credible. The Court's opinion cites the case of Davis v. Alaska, 415 U.S. 308 (1974), as setting forth the gauge to determine the adequacy of permitted cross-examination. The Court's opinion then goes on to discuss the specific testimony of each of the trhee key witnesses against the defendant.

It is apparent that the Fifth Circuit was under a misapprehension of fact. The petitioner's first point on appeal was not directed toward the district judge's limiting his cross-examination of the Government's witnesses. Rather, the complained of error

in the petitioner's first point on appeal was that the district judge, after a proper foundation had already been laid on cross-examination of the Government's witnesses, impermissibly restricted the petitioner's right to impeach the credibility of these witnesses under Rule 613 of the Federal Rules of Evidence by presenting the testimony of defense witnesses, which would have shown that the Government's witnesses had, on prior occasions, given sworn statements inconsistent with their trial testimony. Thus, the petitioner's first point on appeal involved more than simply the right to an adequate cross-examination under the Sixth Amendment, but the fundamental right to offer testimony of witnesses, which, as stated in Washington v. Texas, 388 U.S. 14, 19 (1967), "is in plain terms the right to present a defense."

Moving on to Hart, on direct examination, Hart told a titillating tale concerning

the petitioner's involvement in the marijuana smuggling operations herein. Hart also testified concerning his payment of his legal fees. (Vol. IV, 93).

On cross-examination, Hart denied telling D.E.A. Agent Eaton that Jackson had paid his attorney's fees. He also denied that at a meeting among he and his co-conspirators that had in fact agreed to pin everything on Jack Wells, an alias used by Jackson. (Vol. IV, 141, 147).

When defense counsel attempted to call D.E.A. Agent Eaton to impeach Hart's testimony, he was again denied this opportunity on the basis that it would be impeachment on a collateral matters. (Vol. VIII, 11). The refusal to allow Agent Eaton to testify again deprived the petitioner not only of his one and only opportunity to prove to the jury that Hart had lied to them while under oath at trial, but also denied the petitioner his

one and only opportunity to show that Hart had violated his plea agreement with the Government in the process, again the very basis for his testimony against the petitioner. As previously mentioned, this impeachment of a key government witness cannot be considered "collateral" to the only issue at trial -- the credibility of such witness.

More importantly, however, Agent Eaton's testimony was relevant as being supportive of the petitioner's theory of defense that Hart's sudden involvement of the petitioner in this case in December, 1981, six months after he had already agreed to "come clean" in June, 1981, was the result of there being no one left to testify against except the petitioner. Specifically, Eaton's testimony concerning Hart's previous inconsistent statement to him that Jackson had paid his attorney's fees was evidence that Hart's trial testimony represented a minimizing of Jackson's role in the

conspiracy by Hart in his attempt to convict the petitioner.

Certainly, any testimony supportive of the petitioner's theory that Hart's testimony against the petitioner was motivated by the fact that the petitioner was the "only one left to get" cannot be considered collateral. To the contrary: "special treatment is accorded evidence which is probative of a special motive to lie for if believed it colors every bit of testimony given by the witness whose motives are bared." United States v. Harvey, 547 F.2d 720 (2nd Cir. 1976).

Finally, Hart testified on direct examination that he first came to Louisiana to view the tugboat and barge in August, 1979, and that it was on this first trip that he met the petitioner. (Vol. IV, 120). Agent Eaton's report of his interview with Hart (proffered by the petitioner as Defense

Exhibit 35) revealed that Hart had previously told him he had not come to Louisiana to view the tugboat and barge until November, 1979. Certainly, the date Hart became involved in this conspiracy and allegedly met the petitioner for the first time cannot be considered collateral to the issues in this case.

With regard to Government witness Hart, the Fifth Circuit on page 939 of its opinion stated that the introduction of testimony from D.E.A. Agent Eaton about who paid Hart's attorney fees would have been repetitive since Hart admitted that Jackson might have paid his attorney fees. The Court based this conclusion upon the following trial testimony of Hart:

> Hart: I mean, you know, Jack Wells [Jackson] might have paid Whitice and Whitice paid the bondsman. I don't know. That is -- you know, I don't know that part of it.

The Court's opinion, however, proceeds from a faulty premise. Whitice is the bondsman -- not the attorney as the Fifth Circuit mistakenly believed. Thus, Agent Eaton's testimony would not have been repetitive, let alone restated "ad nauseum". Moreover, the Court's opinion overlooked the fact that the point of eliciting this testimony was not only to demonstrate that Hart had a reason to downplay Jackson's participation in this scheme and implicate the petitioner instead, but to show the jury that Hart had lied to them at trial and violated his plea agreement with the Government in the process.

Finally, with regard to the petitioner's claim that he was improperly denied the opportunity to impeach Hart concerning the date Hart first came to New Orleans and met the petitioner, the Court's opinion recognized that this was not a collateral matter. The Court's opinion, however, stated that this

restriction on cross-examination did not rise to the level of a violation of the petitioner's Sixth Amendment rights since the petitioner had adequate opportunity to expose to the jury that the agent had used a different date in his report of Hart's statement than the date given by Hart at trial.

Again, the Court's opinion overlooked the fact that defense counsel's use of the agent's report as a basis for laying the proper predicate for impeachment by a prior inconsistent statement under Rule 613 of the Federal Rules of Evidence, is no substitute for the live testimony of the agent himself. Certainly, how could the jury possibly draw any inference regarding the respective reliability and credibility of Hart and the D.E.A. Agent Eaton, when the trial judge's ruling prevented them from hearing the live testimony of Agent Eaton.

Lastly, with regard to Whitezell, Whitezell testified at trial that he had not

told Agent Eaton about one of the loads of marijuana when he was interviewed by Agent Eaton subsequent to his arrest and guilty please -- the second split load. (Vol. V, 74, 98, 99). Agent Eaton's report of his interview with Whitezell (proffered by the petitioner as Defense Exhibit 36), however, clearly indicates that Whitezell had told him about the second split load.

Thus, by not allowing Agent Eaton to testify as to Whitezell's previous inconsistent statements, the petitioner was again deprived of his only opportunity to show the jury that Whitezell too had not only lied to them at trial concerning facts directly relevant to this case, but that he had violated his plea agreement with the Government in the process.

In conclusion, the trial court's and the Fifth Circuit's ruling that the veracity of the Government's "star witnesses" was

collateral to the issues at trial erroneously ignored the fact that the only issue at trial was the veracity of these witnesses. By not allowing the petitioner to impeach the veracity of these "star witnesses" the petitioner was denied a fair trial. For, as stated in Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173 (1959): "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Accordingly, the petitioner must be given a new trial at which he be allowed to present the testimony of D.E.A. Agents Eaton and Donald.

B. THE DEMAND FOR ALIBI

Prior to trial, the prosecution presented defense counsel with a Demand for Alibi concerning the three loads of marijuana. This Demand for Alibi listed the dates of the three loads as being: 1) the last two days of January through the first week of February;

2) the last week of March; and 3) April 15-19, 1980. (R. 177-178).

At trial, Whitezell testified that the first load of marijuana was not brought in until Mardi Gras, February 19, 1980. (Vol. V, 22). This date was different from the date of the first load as listed in the Government's Demand for Alibi.

During the petitioner's case, defense counsel sought to introduce the Government's Demand for Alibi into evidence. (Vol. XI, 231). The trial court never ruled that the Demand for Alibi was irrelevant, nor did the trial court state any reason for its exclusion.

> "Mr. Osman: You are saying, simply, that it is not admissible. You are not giving me a reason.
>
> The Court: I am saying that he objects to it. I sustain his objection.
>
> Mr. Osman: Can I have a reason?
>
> The Court: No, sir." (Vol. XI, 238).

Rule 402 of the Federal Rules of Evidence clearly provides that, subject to a few limited exceptions, none of which were mentioned by the trial court, "all relevant evidence is admissible." In the instant case, the relevance of the Government's Demand for Alibi was proffered by defense counsel as follows. The testimony had shown that Whitezell had been cooperating with the Government since September, 1980, one and one half years prior to the filing of the Government's Demand for Alibi. Certainly, the jury could infer that the Demand for Alibi was based upon Whitezell's pre-trial statements to the Government. And, since these pre-trial statements were totally inconsistent with Whitezell's trial testimony, the jury could also infer Whitezell had either lied to them at trial, or lied to the Government prior to trial.

Either way, as a result of the trial court's ruling, the petitioner was once again

denied the opportunity of impeaching one of the Government's "star witnesses" on a matter directly relating to his credibility -- the only issue at trial.

On page 942 of its opinion, the Fifth Circuit stated that the fatal flaw in the defendant's argument is that the prosecutor stated on the record that he had specified the dates on the Demand for Alibi, not Whitezell. The fatal flaw in the Court's opinion is that it overlooked the fact that the petitioner was denied the opportunity to cross-examine the prosecutor under oath concerning the veracity of his representation to the trial judge. More importantly, this court's opinion also overlooked the fact that the jury was totally deprived of the opportunity to decide whether the jury thought the prosecutor's explanation at how he arrived at the dates contained in his Demand for Alibi was reasonable.

For the reasons stated above, the petitioner is entitled to a new trial at which he be allowed to introduce the Government's Demand for Alibi into evidence.

C. THE VIDEO TAPES

During the course of the defense case, the petitioner attempted to intorduce into evidence two video tapes. The first video tape concerned Lloyd's Industries (petitioner's legitimate maritime businesses). The second video tape was a P.M. Magazine (a local television news program) tape concerning Nanci Mann.

The trial court ruled both video tapes inadmissible. The basis for the trial court's

ruling was two pronged. First, the video tapes were "self-serving" and irrelevant. Second, their prejudice would outweigh any relevance they might have. (Vol. XI, 243).

With regard to the relevance of these tapes, the prosecution's theory was that Central Marine Transport, Inc. was a sham corporation formed to cover up the petitioner's marijuana smuggling operation. On the other hand, the petitioner testified concerning his arrangement with Jackson and that Central was formed as a legitimate business whereby he would hustle business with Jackson's tugboat. (Vol. X, 23-28). The Lloyd's Industries video tape, which included a promotion for Central Marine Transport, as well as all of the petitioner's other businesses, was relevant both to corroborate the petitioner's testimony concerning the purpose of Central Marine, as well as to rebut the prosecution's theory that Central was a sham corporation. Furthermore, the Lloyd's Industries video

tape was relevant to support the extent and net worth of the petitioner's various companies, thereby corroborating the petitioner's testimony that he had no financial motive to engage in marijuana related activities.

With regard to the Nanci Mann video tape, the petitioner testified that on the evening of April 19, 1980, he had dinner with Ms. Mann to discuss a P.M. Magazine promotion concerning his employment of Ms. Mann as the only female crewboat operator on the river. Ms. Mann corroborated the petitioner's testimony that he had been with her until approximately 10:30 P.M. (Vol. IX, 146-150). She further testified that she had suggested to the petitioner that he later check on his employees, corroborating the petitioner's explanation for his presence at Chuck's Bar (a location near the off-load site). (Vol. IX, 150).

During the cross-examination of Ms. Mann, the prosecution attempted to impeach her credibility by veiled suggestions that

her relationship with the petitioner was more than that of an employer/employee, and that her presence with the petitioner on the evening of April 19th was not business related. (Vol. IX, 158).

Thus, the relevance of the Nanci Mann video tape was that it would have corroborated both the testimony of Ms. Mann and the petitioner concerning the petitioner's whereabouts and actions on the evening of the 19th, as well as rebutted by the prosecution's innuendos that Ms. Mann was a "girlfriend" of the petitioner, not worthy of belief.

With regard to the trial court's ruling that the prejudice from these video tapes would outweigh any relevance they might have, under Rule 403 of the Federal Rules of Evidence, a trial court may exclude relevant evidence only if it finds that the probative value of the evidence is substantially outweighed by the danger of any unfair prejudice it might have. In the instant case, the

trial court never specified what the prejudice from these video tapes was, except to state that they were "self-serving".

In this regard, because it permits the trial court to exclude concededly probative evidence, Rule 403 is an "extraordinary remedy which should be used sparingly." United States v. Thevis, 665 F.2d 616 (5th Cir. 1982). As was noted in United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979), cert. den'd 444 U.S. 862, 100 S.Ct. 128:

> relevant evidence is inherently prejudicial; but it is only unfair prejudice substantially outweighing probative value, which permits exclusion of relevant material under Rule 403 ....[t]he application of Rule 403 must be cautious and sparing. (emphasis in original)

Utilizing this standard, it is clear that the trial court abused its discretion in excluding these video tapes from the jury's consideration merely because the video tapes were thought to be "self-serving". Indeed, what evidence, testimonial or otherwise, is

ever presented by a party to a lawsuit unless it is thought to be beneficial to the party's case and thereby "self-serving"?

The trial court's ruling with regard to these video tapes unduly restricted the petitioner's ability to bolster his credibility and the credibility of his witnesses, at the expense of the credibility of the prosecution and the prosecution's witnesses.

With regard to the trial judge's refusal to allow the video tape of the P.M. Magazine interview with Nancy Mann into evidence, the Fifth Circuit's opinion stated that this was not error. The basis for the Court's opinion is that, since the Government's proof showed that the petitioner arrived at the off-loading site after midnight, his actions until 10:30 P.M., the time he was with Ms. Mann, are irrelevant. The Court's opinion overlooked and misapprehended the fact that not only did Ms. Mann testify that the petitioner was with her until 10:30 P.M., but she further

testified that she had suggested to the petitioner that he later check on his employees, corroborating the petitioner's explanation for his presence near the off-loading site after midnight. Thus, the Nanci Mann video tape, which would have rebutted the Government's innuendos that Ms. Mann was a lover of the defendant and not worthy of belief, was clearly relevant.

D. THE TESTIMONY OF FT. LAUDERDALE DETECTIVE MARTIN

The Government in its direct case brought out the fact that Jackson had been murdered in Ft. Lauderdale, Florida on November 6, 1981. (Vol. II, 169). On his cross-examination of Hindelang, the petitioner established that not only was Hindelang out of jail on bond at the time of Jackson's murder, but that Hindelang was still owed money by Jackson. (Vol. IV, 4-6). Hindelang further admitted on cross-examination that he had never verified Jackson's claim that Jackson had been giving

20% of all profits to the petitioner. Hindelang also admitted that "rip offs" were common in the drug business. (Vol. IV, 6-7).

The petitioner testified that he had told an emissary of Hindelang's that he had never received any money from Jackson. (Vol. X, 184-186). Thus, the petitioner had developed facts indicating that Hindelang had both the motive and opportunity to have murdered Jackson.

During the petitioner's case, defense counsel attempted to call as a witness Ft. Lauderdale Detective Martin to testify as to the circumstances surrounding Jackson's murder. This testimony would have established that Jackson was murdered in a violent, gangland style fashion,[1] thereby creating additional circumstances from which the jury

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[1] Jackson had been shot through the head and two empty suitcases were found next to his body.

could infer that Hindelang was responsible for Jackson's murder. The trial court refused to allow Detective Martin to testify, ruling that, even if this evidence did support the petitioner's theory that Hindelang was responsible for Jackson's murder, it was both irrelevant and prejudicial. (Vol. IX, 83).

Without much discussion, the Fifth Circuit at p. 942 of its opinion stated that the trial court ruling was proper.

Petitioner submits that Detective Martin's testimony was clearly relevant. If Hindelang had been involved in Jackson's murder, his cooperation with the Government could certainly have been viewed by the jury as an attempt by Hindelang to minimize any suspicion of him in the murder, thereby creating in Hindelang a special motive to lie. And, as previously mentioned, "special treatment is accorded evidence which is probative of a special motive to lie for if believed it

colors every bit of testimony given by the witness whose motives are bared." United States v. Harvey, supra.

As for the trial court's ruling that such testimony was prejudicial, again, as was the case with the video tapes, the trial court never specified any prejudice that would inur to the Government from this testimony, let alone "unfair" prejudice that would "substantially" outweigh its probative value. See United States v. Thevis; United States v. McRae, supra.

In conjunction with all of the other rulings of the trial court limiting the petitioner in the presentation of his case, as discussed above, the trial court's exclusion of Detective Martin's testimony was reversible error.

Accordingly, the petitioner is entitled to a new trial.

II.

THE TRIAL COURT, THROUGH A SERIES OF RULINGS RESTRICTING THE PETITIONER'S ABILITY TO CONDUCT A MEANINGFUL CROSS-EXAMINATION OF PROSECUTION WITNESS HINDELANG, VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW AND TO CONFRONTATION OF THE WITNESSES AGAINST HIM, AS GUARANTEED TO HIM BY THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

By the time of the petitioner's trial, Hindelang had already pled guilty for his involvement in this case. Hindelang's plea agreement provided that he turn over all of his illegally gained assets to the Government, and that he testify truthfully in any and all cases in which he would be called as a Government witness. In return, the Government would dismiss several counts of the indictment against Hindelang, limiting his maximum possible period of incarceration to sixty-five years. Furthermore, the Government would make Hindelang's cooperation known to the sentencing judge. (Vol. 160).

Pursuant to Hindelang's plea agreement, Hindelang began cooperating with the Government. A pre-sentence investigation report was conducted on June 24, 1981, Hindelang was sentenced to fifteen years imprisonment. (Vol. III, 195). Hindelang was ordered to surrender on October 21, 1981. (Vol. III, 204).

One day prior to the date set for Hindelang's surrender, Hindelang's attorney filed a Motion for Reduction of Sentence. A "secret" hearing was held upon Hindelang's motion. At the time of Hindelang's trial testimony herein, his Motion for Reduction of Sentence had not yet been ruled upon, and Hindelang remained free on bond. (Vol. III, 210).

The petitioner's pre-trial motions for the Government to produce a copy of the transcript of the "secret" hearing held upon Hindelang's Motion for Reduction of Sentence, as well as for him to be permitted to inspect a copy of Hindelang's pre-sentence

investigation report were denied. These rulings by the trial court severely restricted the petitioner's ability to conduct a meaningful cross-examination of Hindelang, in violation of the petitioner's rights to due process of law and the confrontation of witnesses against him, as guaranteed to him by the Fifth and Sixth Amendments to the Constitution of the United States.

A. THE TRANSCRIPT OF THE SECRET RULE 35 HEARING

In Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-7 (1963), the Supreme Court of the United States held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution." The prosecution must produce impeachment evidence favorable to the accused, as well as direct evidence. Williams v. Dutton, 400 F.2d

797 (5th Cir. 1968). [2]

As stated by the Supreme Court:

> When the "reliability of a given witness may well be determinative of guilt or innocence" nondisclosure of evidence affecting credibility falls within a [the] general rules [of Brady].

Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972), quoting Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959).

In the instant case, the trial court's denial of the petitioner's request to be provided with the transcript of Hindelang's "secret" Rule 35 hearing restricted the petitioner's ability to impeach Hindelang's trial testimony in two significant ways.

First, Hindelang had been cooperating

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[2] Brady's application to impeachment evidence has been continuously recognized by this Court. See, United States v. Martino, 648 F.2d 367 (5th Cir. 1981); United States v. Auten, 632 F.2d 478 (5th Cir. 1980); United States v. Judon, 567 F.2d 1289 (5th Cir. 1978); United States v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977).

with the Government since his guilty plea. He had been debriefed by the D.E.A. not only as to this case, but as to all of his other marijuana related activities, including the other persons with whom he had been involved. (Vol. III, 201-203). According to Hindelang's trial testimony, D.E.A. agents had testified at his "secret" Rule 35 hearing and had made details of Hindelang's cooperation known to Hindelang's sentencing judge. (Vol. III, 208).

Had the petitioner been provided with the transcript of this "secret" hearing, including the names of the individuals Hindelang claimed he had been involved with in other marijuana related activities, the petitioner would then have had the opportunity, through pre-trial investigation, to attempt to verify Hindelang's claims. For example, suppose Hindelang, in furtherance of his plea agreement to tell the truth, had told the Government that on a particular date he had been involved in a marijuana deal with a particular

person in New Orleans. Suppose further that the petitioner, being able to investigate this claim, was able to prove that Hindelang's statements to the Government were not truthful since on that particular date the person alleged to have been involved with Hindelang in New Orleans was, in fact, in New York. Not only would this impeach Hindelang's credibility by showing that he had violated his plea agreement with the Government by not telling the truth with regard to this other individual, but it would also lend substantial weight to the arguments of the petitioner that Hindelang was not telling the truth with regard to him.

The trial court's ruling, however, denied the petitioner any such opportunity for a meaningful pre-trial investigation designed to impeach Hindelang's credibility at trial. [3]

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[3] The trial court had also denied the petitioner's pre-trial motion for the production of statements made

Secondly, and more importantly, at trial Hindelang testified that no promises had been made to him, except as contained in the plea letter sent by the Government to the petitioner that the Government would make Hindelang's cooperation known to the sentencing court. (Vol. II, 158-166).

Prior decisions of the Fifth Circuit and the United States Supreme Court, however, establish that the petitioner should have been allowed to inspect the transcript of Hindelang's "secret" Rule 35 hearing to determine what promises or bargains, if any, the Government or sentencing court made at this hearing

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by Hindelang naming others in furtherance of his cooperation with the Government. Furthermore, at the trial itself, when Hindelang testified as to his involvement in marijuana related activities with persons in Florida who were allegedly the contacts for his Colombian sources in this case, the trial court, consistent with its pre-trial ruling, refused to allow the petitioner to cross-examine Hindelang with regard to the identity of these other persons, thereby again denying the petitioner the opportunity to conduct any meaningful investigation to impeach Hindelang's credibility. (Vol. III, 28-33).

contrary to or in addition to the plea agreement letter sent to the petitioner.

In United States v. Tashman, 478 F.2d 129 (5th Cir. 1973), this Honorable Court reversed a conviction because the Government failed to disclose an agreement with a co-defendant who later became the star witness in the case. The agreement was reached at a "secret" proceeding, the transcript of which was sealed by the trial court.

The sealed transcript in Tashman, which the Government claimed was immaterial and irrelevant, contained an agreement between the Government and the co-defendant. The Government's failure to disclose that agreement required a new trial:

> We need not speculate on what effect knowledge of the secret contingent agreement would have had on the jury. The Supreme Court has made it clear that the failure of the government to disclose to a jury plea bargain negotiations with a key witness deprives a defendant of constitutional due process. 478 F.2d at 131.

The Fifth Circuit's decision in Tashman, was later reinforced in United States v. Onori, 535 F.2d 938, 945 (5th Cir. 1976), where the Court made clear that the right of a criminal defendant to cross-examination of a key witness against him is "so important that the defendant is allowed to search for a deal between the government and the witness, even if there is no hard evidence that such a deal exists.

In the instant case, the petitioner had a right to search for answers to the following questions: What position did the Government take at this secret hearing? Did the Government vehemently oppose Hindelang's motion? Did the Government remain silent, thereby acquiescing in Hindelang's motion?

Furthermore, what was the position of the sentencing court? Did the sentencing court make any indication to Hindelang that his continued cooperation would weigh in his favor of the court granting his motion? Did

the trial court indicate to Hindelang that his motion would be influenced by the results of Hindelang's testimony at the petitioner's trial?

Certainly, any such statements by the trial court at this "secret" hearing would have directly impeached Hindelang's trial testimony and established a stronger motive for his testimony than his nebulous hope of cooperation from the Government. A promise of leniency from the sentencing court, direct or implied, is substantially more meaningful than a Government promise to bring any cooperation to the attention of the sentencing court.

Under Brady, any such statements should have been provided to the defense. The petitioner should have the opportunity to review the "secret" hearing held upon Hindelang's Motion for Reduction of Sentence to determine if it contains any evidence which affects Hindelang's credibility as a witness. If

the transcript of the "secret" hearing contains additional plea bargain material, the failure to disclose it was error per se. If it contains helpful defense material of any nature, and there is a "reasonable likelihood" that it would have affected the jury, petitioner is entitled to a new trial. See United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976).

The Fifth Circuit's opinion at p. 943 states that, "if the Court had permitted the use of this transcript, the prejudice to the Government's ongoing investigations unrelated to the Balliviero case would have been substantial."

The Court's opinion overlooked the fact that the trial court's ruling in this regard was made without any effort by the trial court to fashion a procedure balancing the petitioner's need for such information against the Government's need to preserve the integrity of their continuing investigations.

Certainly, defense counsel, as an officer of the Court, could have been permitted access to the transcript of this hearing for the limited purpose of ascertaining whether any additional promises had been made to Hindelang without the Government's ongoing investigations being placed in jeopardy.

Furthermore, the petitioner does not misperceive the thrust of the doctrine established in Brady v. Maryland, 373 U.S. 83 (1963). The petitioner has not, as stated by the Fifth Circuit on p. 943 of its opinion, simply alleged the presence of favorable material expecting to win reversal of his conviction. Rather, the defendant has cited specific case law that establishes his right to inspect the transcript of Hindelang's secret Rule 35 hearing to determine what promises or bargains, if any, the Government or sentencing court made at this hearing contrary to or in addition to the plea agreement letter sent to the defendant. See, United

States v. Tashman, 478 F.2d 129 (5th Cir. 1973); United States v. Onori, 535 F.2d 938 (5th Cir. 1976). The Court's opinions overlooked these authorities and left the state of the record such that, if the transcript of Hindelang's secret Rule 35 hearing did contain additional promises made to Hindelang by the Government or the sentencing court, they have been forever buried.

ARGUMENT

III.

THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL AS TO THE FIRST COUNT OF THE INDICTMENT (CONTINUING CRIMINAL ENTERPRISE) WHERE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE PETITIONER HAD OBTAINED SUBSTANTIAL INCOME OR RESOURCES FROM THE ENTERPRISE.

It is fundamental that in a criminal case the burden is upon the prosecution to prove every element of the offense charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970). Accordingly, in the instant case, before the jury's verdict can

be sustained, there must have been sufficient evidence adduced at trial that the petitioner, in conjunction with meeting all of the other requirements of the continuing criminal enterprise statutes, obtained, "substantial income or resources" from the enterprise. 21 U.S.C. § 848(b)(2)(B).

In the instant case, Hindelang testified on direct examination that Jackson had told him the petitioner was his partner and was to receive 20% of all of the profits from the marijuana operations, with Jackson and Hindelang to split the remaining profits equally. (Vol. II, 195-196). On cross-examination, however, Hindelang admitted that "rip offs" were common in the drug trade. Furthermore, he never attempted to verify whether Jackson's representations to him concerning the petitioner were true, or whether the petitioner had in fact been paid any money by Jackson. Thus, the only evidence that the petitioner actually received any money from these

marijuana related activities was the testimony of D.E.A. Agent Egan that, upon his arrest, the petitioner made a statement to him to the effect that he had only received $66,000.00 for "running the boat".

In this regard, the petitioner testified that the $66,000 he told D.E.A. Agent Egan he had made for "running the boat" referred to his $16,000 brokerage fee plus legitimate business he had hustled on his own with the tugboat LOIS CROSBY. Not only was this testimony unrebutted, but the $16,000 brokerage fee was verified by the petitioner's accountants as having been reported on the petitioner's 1979 income tax return.

Where, as here, the Government's evidence that the petitioner received <u>any</u> income from the marijuana activities forming the basis for the continuing criminal enterprise count of the indictment was entirely circumstantial, and rested solely upon a statement made by the petitioner which was

given an entirely innocent explanation, it cannot be said that that essential element of the crime was proved beyond a reasonable doubt. For, it is axiomatic that when circumstantial evidence is relied upon to sustain a conviction, the inferences that may reasonably be drawn from that evidence must not only be consistent with the petitioner's guilt, but inconsistent with every reasonable hypothesis of his innocence. United States v. Arroyave, 477 F.2d 157, 163 (5th Cir. 1973).

In any event, even if the circumstantial evidence was sufficient to show that the petitioner had received $66,000 for his participation in the marijuana transactions herein, the petitioner submits that that amount of money, under the circumstances of this case, where crew member Whitezell testified that he received $50,000 (Vol. IV, 88-89), cannot be considered "substantial income".

The Fifth Circuit seemed satisfied with the testimony concerning the gross value of

all marijuana smuggled during these operations and the testimony that petitioner was to receive 20% of the profits. However, unless petitioner actually received his share or any share, he could not have derived "substantial income". These values alone do nothing for the Government's case, unless the next logical step be shown, i.e., that petitioner got something out of it. The record is totally void on this all-important point.

For this reason, the conviction for violation of 21 U.S.C. § 848, pertaining to engagement in a continuing criminal enterprise, must be reversed.

CONCLUSION AND PRAYER

For the foregoing reasons, petitioner, LLOYD BALLIVIERO, prays that this Honorable Court issue a writ of certiorari, vacate the convictions and remand the case to the district court accordingly.

Respectfully submitted,

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BY: _____
EDWARD J. CASTAING, JR.

BY: _____
F. IRVIN DYMOND

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition of Certiorari have been served on John Volz, United States Attorney, and Harry McSherry, Assistant United States Attorney, Hale Boggs Federal Bldg., 500 Camp Street, New Orleans, La. 70130, by U.S. Mail, postage prepaid, on this the ____ day of August, 1983.

_____
COUNSEL FOR PETITIONER

83-444

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LLOYD BALLIVIERO

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL PETITION BY PETITIONER
(APPENDICES)

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-3413

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LLOYD BALLIVIERO,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND
ON SUGGESTION FOR REHEARING EN BANC

Before RUBIN, GARZA and WILLIAMS, Circuit Judges.

BY THE COURT:

Petition for Rehearing - DENIED.

Suggestion for Rehearing En Banc - DENIED.

(July 6, 1983)

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lloyd BALLIVIERO,
Defendant-Appellant.

No. 82-343.

United States Court of Appeals,
Fifth Circuit.

May 2, 1983.

Defendant was convicted in the United States District Court for the Eastern District of Louisiana, at New Orleans, Morey L. Sear, J., of conspiracy to possess with intent to distribute marijuana, possession with intent to distribute marijuana, conspiracy to import marijuana, importation of marijuana, and participation in a continuing criminal enterprise, and he appealed. The Court of Appeals, held that: (1) there was no improper limitation on cross-examination of certain Government witnesses, and (2) there was no error in exclusion of certain evidence.

Affirmed.

1. Witnesses

Sixth Amendment does not mandate unlimited

cross-examination; trial judge is permitted to step in where cross-examination becomes repetitious or simply confuses the jury with a host of collateral matters. U.S.C.A. Const.Amend. 6.

2. Criminal Law

Witnesses

In prosecution arising from marijuana smuggling operation, there was no error in refusing to permit defendant to call a Drug Enforcement Administration agent to testify about whether prosecution witness had admitted ownership of various properties, despite contention that this was improper limitation on cross-examination of the witness, a confessed drug smuggler, since this was a collateral matter and, in any event, prejudice did not appear since witness admitted that agent had testified about his assets U.S.C.A Const. Amend 6

3. Witnesses

In prosecution arising from marijuana smuggling operation, there was no improper limitation on cross-examination of Government witness by denying opportunity to present alleged prior inconsistent statement about who had paid

witness' attorney fees in a different prosecution, despite contention that testimony would demonstrate that witness had reason to downplay another participant's participation in the scheme and implicate defendant instead, where witness admitted on the stand that the other participant might have paid his attorney fees, so that the statement would have been repetitive. U.S.C.A. Const.Amend. 6.

4. Witnesses

There was no rationale for introduction of prior "inconsistent" statement by witness where witness did not deny making the statement but said only that he did not remember doing so.

5. Witnesses

In prosecution arising from marijuana smuggling operation, defendant was not improperly denied opportunity to impeach prosecution witness concerning date on which they first met, though DEA agent was not allowed to testify that witness had given a different date than testified to by witness, where it was clear from the record that defendant had adequate opportunity to expose to the jury that

the agent had used in his report a different date than that testified to by the witness, so that restriction on cross-examination did not rise to the level of violation of defendant's Sixth Amendment rights. U.S.C.A. Const. Amend. 6.

6. Witnesses

In prosecution arising from marijuana smuggling operation, there was no improper limitation on cross-examination of Government witness in denying defendant opportunity to question DEA agent about whether witness had mentioned specific marijuana shipment in his statement, where witness admitted he may have lied to agent and agent would simply have confirmed that witness did not lie to him initially, thereby serving only to restore the credibility of the witness. U.S.C.A. Const.Amend. 6.

7. Witnesses

In prosecution arising from marijuana smuggling operation, trial court properly exercised its discretion in excluding from evidence Government's demand for alibi, as this would have served only to confuse the jury, though one date therein did not corre-

spond to actual date of offloading of marijuana and defendant believed that a prosecution witness had supplied the information which led to the preparation of the demand, where prosecutor stated on the record that he had specified the dates on demand and that the dates did not come from the witness.

8. Criminal Law

In prosecution arising from marijuana smuggling operation, in which it was undisputed that defendant had brokered purchase of a barge and tugboat for participant but contended that he was legitimate businessman, there was no error in not permitting defendant to introduce a promotional videotape of his company to show that it was not simply a sham enterprise, where tape would have been repetitive in light of testimony at length by defendant and two accountants that company was legitimate and profitable, and where the Government never contended that the business was a sham.

9. Criminal Law

In prosecution arising from marijuana

smuggling operation, trial court properly concluded that videotape showing that defendant was with another person until 10:30 p.m. on a certain night was irrelevant and would only introduce extraneous matters that would confuse the jury, where the Government proof showed that defendant arrived at marijuana offloading site after midnight, so that his actions until 10:30 p.m. were irrelevant.

10. Criminal Law

In prosecution arising from marijuana smuggling operation, there was no error in prohibiting defendant from calling homicide detective who investigated murder of one of the participants or in exclusion of photographs of the murder scene and victim's body, where defendant was permitted to weave his theory about a Government witness' participation in the murder and the photographs not only failed to strengthen the inference that the witness committed the murder, but were also highly prejudicial.

11. Criminal Law

In prosecution arising from marijuana

smuggling operation, trial court properly denied access to transcript of Government witness' sentence reduction hearing at which witness allegedly implicated a number of other persons, despite defendant's assertion that he should have had chance to review those names and verify claim that each of such persons was involved in marijuana smuggling, as this information was irrelevant to defendant's case and would have confused the jury and wrongly prejudiced the Government's case.

12. Criminal Law

There was no error in not permitting defendant to utilize transcript of Government witness' sentence reduction hearing to determine whether any additional promises were made to witness, where prejudice to Government's on-going investigations unrelated to defendant's case would have been substantial and where a day and a half of cross-examination had permitted defendant to extensively challenge the credibility of the witness.

13. Criminal Law

A defendant cannot simply allege the presence of favorable material and win a reversal of his conviction; defendant seeking to establish a Brady violation must prove: the prosecution's suppression of evidence; favorable character of the suppressed evidence for the defense; and the materiality of the suppressed evidence.

14. Criminal Law

Trial court's refusal to permit defendant to view presentence investigation report made in connection with plea agreement of prosecution witness, after reviewing the report for possible Brady material, was tantamount to a statement that there was no Brady evidence in the report, and thus there was no error in not permitting defendant to view the report, in light of rule requiring that strictest confidentiality be afforded information provided by defendant to probation officer. Fed.Rules Cr.Proc Rule 32(c), 18 U.S.C.A.

15. Conspiracy

Circumstantial evidence may serve to

prove the receipt of substantial income, in prosecution for participation in a continuing criminal enterprise.

16. Conspiracy

In prosecution for participation in a continuing criminal enterprise and other offenses in relation to marijuana smuggling operation, evidence was sufficient to prove that defendant obtained substantial income from the smuggling venture.

17. Criminal Law

Defendant's comments about guilt made at sentencing hearing were not relevant to his appeal, which considered the fairness of his trial, and were improperly included in Government's brief.

Michael J. Osman, Miami, Fla., for defendant-appellant.

John P. Volz, U.S. Atty., John Patrick Deveney, Harry W. McSherry, Jr., Asst. U.S. Attys., New Orleans, La., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RUBIN, GARZA and WILLIAMS, Circuit Judges.

PER CURIAM:

Convicted below of nine counts of marijuana related criminal activity, defendant brings this appeal to challenge the limitations imposed unpon his cross-examination of certain government witnesses, as well as the court's exclusion of certain evidence. After a thorough review of the record, we conclude that he had ample opportunity to delve into all relevant topics including the possible motives for the adverse testimony, and the judge, therefore, did nothing improper in cutting off cross-examination when he did. He also committed no error in refusing to permit the introduction of certain irrelevant and prejudicial items of evidence. Accordingly, we affirm the district court's judgment.

Defendant Lloyd Balliviero was indicted for and convicted of conspiracy to possess with intent to distribute marijuana, posses-

sion with intent to distribute marijuana, conspiracy to import marijuana, importation of marijuana, and participation in a continuing criminal enterprise. He was sentenced to a term of thirty years in prison and fined $100,000.

The scheme in which Balliviero was involved took place in Louisiana, not far from New Orleans, where, in 1979 and 1980, he assisted in the importation of more than 350,000 pounds of marijuana. The importation scheme proceeded in the following manner. The Colombian-grown marijuana was shipped from Colombia to a spot about ten miles off the coast of Louisiana. It is here that the American activity began. A. Barge, pulled by a tugboat and accompanied by a crewboat, was sent out to the "mother ship." The barge would pull up to the side of the ship and the transfer would begin. About eight hours later, the barge was loaded with marijuana and ready to begin the trip into the United States. The barge was towed back to the coast and then up a series of canals and rivers until it reached

its destination: Hero Canal. There, under cover of darkness, the barge was unloaded, the bales of marijuana transferred to large trucks and the journey to distribute the marijuana throughout the country would begin.

Balliviero's role in this venture was pilot of the crewboat full of workers who offloaded the marijuana. He also brokered deals for a man known under a variety of names including Ralph Jackson and Jack Wells since Balliviero owned an area business named Central Marine Transport, Inc., and could make such large purchases without arousing suspicion. It is undisputed that he brokered a number of purchases for Mr. Jackson, including the purchase of a barge for $70,000 and a tugboat for $170,000. It was defendant's testimony that he was simply a legitimate businessman, who happened to be invloved, unbeknownst to him, in business deals with marijuana smugglers. He contends that he simply carried out legitimate brokering activities. The government naturally presented a different scenario through a series of witnesses who testified

that they came in contact with Balliviero on the smuggling missions.

[1] The cross-examination of three government witnesses is the subject of the first portion of defendant's appeal. He maintains that the district judge impermissibly cut off cross-examination which would have exposed the fact that the witnesses had lied in court and were not credible. In conducting an examination of the sufficiency of the permitted cross-examination, it is important to recognize that the sixth amendment does not mandate unlimited cross-examination. Although cross-examination is certainly a crucial tool for a defendant to expose his case to the jury, it may reach a point where it becomes repetitious or simply confuses the jury with a host of collateral matters. At this point, the judge is permitted to step in. As a gauge to determine the adequacy of the permitted cross-examination, we look to Davis v. Alaska, 415 U.S 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), where the Supreme Court stated that in order for cross-examination to satisfy the

sixth amendment, the defendant must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." 415 U.S. at 318, 94 S.Ct at 1111.

[2] Balliviero first challenges the limitation of his cross-examination of Paul Hindelang, a confessed drug smuggler, Hindelang testified that he had seen Balliviero only once, when he was on a crewboat piloted by the defendant which went out to the mother ship. He stated that he had only talked with Balliviero about navigational hazards and his ability to navigate the boat; they did not discuss defendant's role in the smuggling operation. Nonetheless, his testimony was very damaging to defendant because the location at which he talked to defendant--on a crewboat going out to unload marijuana--indicated that Balliviero was informed about the nature of the business in which he was involved. Furthermore, he related to the jury conversations with other members of the smuggling conspiracy in

which Balliviero's activities were discussed.

The defense conducted an extensive cross-examination of Hindelang, which lasted for more than a day and one-half. In the course of that examination, Hindelang was questioned in detail about his family history, his activities in marijuana smuggling both before and after his contact with Balliviero, his plea bargain agreement with the government and the advantages he had gained therefrom, his bond reduction hearing, and the murder of Jackson, as well as the intimation that he might be involved. The only complaint made about the scope of the cross-examination of Hindelang is that counsel was prevented from calling a D.E.A. agent to testify about whether Hindelang had admitted ownership of various properties in the U.S. and a multi-million dollar interest in a cable television company in Costa Rica, which were acquired with the proceeds from his criminal activities.

The judge did permit extensive questioning of Hindelang about the extent of his illegally

obtained assets, which he pledged to give up in his plea bargain agreement. In fact, a review of the record demonstrates that defense counsel asked Hindelang about the exact information to which the D.E.A. agent would have testified. Hindelang did not deny that the agent had testified previously that he owned a cable television company in Costa Rica and numerous properties in the United States. In fact, he implicitly admitted this. He did dispute, however, the accuracy of the statements made by the agent. The following excerpt of defense questioning confirms this.

> Q Isn't it a fact, sir, that during your association with Agent John Donald of the Drug Enforcement Administration, when he was working in an undercover capacity, that you had many conversations with him in which you discussed farmlands and that you told him that you owned approximately 22 farms or sections of farmland in Arkansas, plus properties in Illinois, Mississippi and

Montana?

A No, that was false. Mr. Donald knew it was false.

Q So you're stating here under oath that Drug Enforcement Administration Agent John Donald testified falsely before the United States magistrate?

A In that particular case, I am saying what he said was not correct.

Q Did you ever tell Agent John Donald during the investigation that he was conducting, when he was working with you undercover, that you owned a couple of houses in the Florida area that you used as a safe house to store quantities of marijuana?

A No, sir.

Q So that if Mr. Donald testified under oath about that before the United States magistrate, he would be lying?

A Can I clarify the situtation, please?

Q Certainly.

A We most certainly talked about farmland. We most certainly talked about

> research that I was doing about farmland, and at no time did I ever say that I owned any farms anywhere. And we also talked about houses in Miami and which I had rented, and at no time did I ever state that I owned or didn't own them. I just said I had stash houses in Miami.

Record on Appeal, vol. 5 at 163-64.

The trial judge committed no error in refusing to permit defendant to question the D.E.A. agent about this collateral matter. Furthermore, we fail to understand the alleged prejudice to defendant's case occassioned by this ruling. Hindelang admitted that the agent had testified about his assets.

[3] The second claim of improper limitation of cross-examination relates to government witness David Hart. First, Balliviero claims that he was denied the opportunity to present a prior inconsistent statement about who paid Hart's attorney fees in a different prosecution. The introduction of this information, however, would have certainly been repetitive since Hart admitted on the stand that Jackson might have paid his attorney's fees.

> Hart: I mean, you know, Jack Wells,

> [Jackson] might have paid Whitice and Whitice paid the bondsman. I don't know. That is -- you know, I don't know that part of it.

Record on Appeal, vol. 6, 141.

Defendant contends that the point of eliciting this testimony was to demonstrate that Hart had a reason to downplay Jackson's participation in the scheme and implicate Balliviero instead. He was allowed to make this point, and the judge certainly had the right to prohibit him from restating it ad nauseum.

[4] Balliviero also challenges the trial court's refusal to allow extrinsic evidence to show Hart made a prior inconsistent statement that he and other conspirators in a separate case had agreed to concoct a story about who was to blame for the charge. Again, defense counsel has mischaracterized the record in this case. Hart never denied that he had made such a statement; he only said that he did not remember doing so.

> Q Do you recall, sir, in the end of May or beginning of June, 1981, making a statement to Agent Eaton and telling him with regard to that meeting that Wells said that he was aware the arrest warrants existed for Pat Phil and Jack Wells, and he said, "Put it all

on Herb Alleman and Jack Wells, that no one knows who Jack Wells really is"? And that Kilcoyne, Dunan, and you agreed to go with Wells' story, and the meeting adjourned?

A No, I don't, sir.

Q Do you deny making that statement to Agent Eaton?

A I don't deny it, but I don't remember making it.

Record on Appeal, vol. 6 at 147-48 (emphasis added). Since there is no denial that the statement was made, there is clearly no rationale for the introduction of a prior "inconsistent" statement about the incident.

[5] As a final challenge to the cross-examination of Hart, defendant asserts that he was improperly denied the opportunity to impeach Hart concerning the date on which they first met. On direct examination, Hart testified that he first came to Louisiana in August of 1979 and met Balliviero on that trip. Balliviero contends that Hart told a D.E.A. agent that he first came to Louisiana in November of that year. Although the agent was not allowed to testify, it is clear from the record that defendant had adequate opportunity to expose to the jury that the agent had used the November date in

his report of Hart's statement.[1] Hart either lied or was confused about the dates. The defense examination of Hart revealed this to the jury.

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[1]The cross-examination of Hart on this particular point proceeded as follows:

Q Now, sir, when was it that Jack Wells first contacted you--strike that. When was it that you first met Jack Wells?

A I would say it was June or July of '79.

Q Wasn't it actually around September 15th of 1979?

A Could have been. As I say, it was in the summer because I--I know it was when I came over to look at the vessel over here that--

Q Didn't you tell Agent Eaton, in May of 1981, that you first met Jack Wells on or about September 15th, 1979?

A I don't know whether I told him that or whether I came over here September 15th, 1979. I think I met Jack Wells two or three weeks earlier and he made arrangements for me to come over here. It is right in that area.

Q Is is that you don't remember or you deny that you told Agent Eaton that you first met Jack Wells on or about September 15th, 1979?

Both parties recognize that this is not a collateral matter. We have long recognized

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1(cont'd)

A I don't remember.

Q You don't remember?

A No.

* * * * * * * * * * * * *

Q Now, I believe, on direct examination, you testified that you first came-- or the first time you came to New Orleans to look at the tugboat was in August of 1979, is that true?

A Yes, and that is why I say I must have met Mr. Wells earlier than September, and I believe it was because I came over just to look at the tugboat and I believe it was in August and I came over again in September.

Q Did you tell Agent Eaton, on May 29th or thereabouts, in 1981, that in November of 1979 Wells called you and gave you a progress report on the tugboat and barge and suggested that you travel to New Orleans to inspect the equipment?

A True.

* * * * * * * * * * * * *

Q Which is it? When did you first come to New Orleans, in August or November of 1979?

A It was in August. It was at least August, and I believe again in September,

that "while the scope of cross-examination is within the discretion of the trial judge, this

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1(cont'd)

and it could be again in November. Could have been three times. I came over two or three times to look at the vessel, one time to operate the vessel just briefly.

Q I am talking about the first time.

* * * * * * * * * * * *

A I say in August.

Q Now, sir, when you came to New Orleans, whenever the first time was, you were shown the tugboat by Mr. Wells?

A No,sir.

Q You didn't see the tugboat?

A Yes, sir.

Q All right, you saw the tugboat?

A Yes, sir.

Q You had an occasion to meet my client, Mr. Balliviero, on that occasion?

A Yes.

Record on Appeal, vol. 6 at 116-20.

discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." United States v. Bass, 490 F.2d 846, 858 n.12 (5th Cir. 1974). See also United States v. Elliott, 571 F.2d 880,908-09 (5th Cir. 1978). However, the record reveals that defendant was allowed the opportunity to "expose to the jury the facts from which jurors, as the sole trier of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses." Davis v. Alaska, 415 U.S. at 318, 94 S.Ct. at 1111. Consequently, we find that the restriction on cross-examination did not rise to the level of a violation of defendant's sixth amendment rights.

[6] Balliviero makes his final attack on the limitation of cross-examination of government witness Phil Whitezell. Whitezell was the last of the "insider" witnesses, who were involved in the drug smuggling operation and

later cooperated with the government in exchange for which the government agreed to drop some of the charges against them. Defendant asserts that he was improperly denied the opportunity to question a DEA agent about whether Whitezell had mentioned a specific marijuana shipment in his statement. Whitezell stated at trial that he had neglected to mention one load of marijuana because of tax consequences. Later in his testimony, he also admitted that he might not have been truthful to the agent in his initial interview.

Q Now, sir, how many marijuana runs did you go on, forgetting the aborted mission, the first ones you didn't meet the mother ship?

A There were three on the LOIS CROSBY, and one on the PEE WEE for me.

Q Do I understand you correctly to say that you were on all three trips?

A That's right.

Q Did you tell Agent Eaton when he interviewed you, in October of 1981, that you

in fact had been on all three trips?

A No, I left out one of the trips.

Q You left out one of the trips?

A Yes, I did. When I went in, it was stated to me, well, we know about both deals that went good, and we know about one attempt. And I didn't tell them about the third deal because--well, because of the IRS. I am trying to clean up now, and you know, I have to make a statement that I did this, and I left out one of the trips.

Q And the trip you say you left out was the third trip?

A No, it was the second trip, the split trip.

Q Well, the split trip, was that the trip where the--after the offloading operation the barge was only partially full of marijuana?

A It was at first, you know. The first trip we went out we missed the boat, and then we went out and found her and got

some. Then we had to go out and get the rest.

Q You are absolutely certain that was the second load?

A That's right.

Q And you are saying you did not tell Agent Eaton about this second load?

A That's right.

Q You are absolutely certain about that?

A That's right.

* * * * * * * * * * * * *

Q In October of 1981, did you make a statement to Agent Eaton that the transfer of marijuana was completed about two hours before dawn and the offloaders returned to the crewboat and the three vessels untied and departed, and that the LOIS CROSBY and the barge which was only partially full of marijuana returned to the mouth of the Mississippi River and continued upstream on a 2-1/2 day journey? Do you recall making a

statement to him like that?

A When I first went to Brent, it was the first time I spoke to anybody. I was really not steady, and I don't recall exactly what I told Brent. I know the statements I told him about Charlie Smith were true and correct, but the deals I don't--I don't remember what I told him, and I don't remember if I was completely truthful in all my statements.

Record on Appeal, vol. 7, at 73-76.

As the record excerpt indicates, Whitezell admitted that he may have lied to the agent. It is this statement that allows counsel to successfully attack the credibility of this witness. At trial, the witness admitted his participation with the second load of marijuana. It is about this participation that the DEA agent would have testified. The DEA agent, therefore, would have simply confirmed Whitezell did not lie to him initially. We are unable to comprehend how the credibility

of this witness would have been attacked by the revelation that Whitezell gave the same information at trial as he did to the agent.[2]

[7] Next, Balliviero complains about the court's exclusion of the government's Demand for Alibi. The Demand for Alibi listed dates that allegedly correspond to the shipments of marijuana. The first date, however, did not correspond to the actual date of the offloading. The defense believes that Whitezell supplied the information which led to the preparation of this Demand for Alibi. Defense counsel sought to introduce it and then impeach Whitezell since he had not mentioned the first date anywhere in his testimony. The fatal flaw in this argument is that the prosecutor stated on the record that he had specified the dates on the Demand for Alibi. He added

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[2] The government suggests that the defense wished to demonstrate that Whitezell had also failed to mention a fourth load of marijuana. Whitezell never testified about this fourth load at trial, however, and therefore there is no inconsistency with a prior statement.

that the dates did not come from Whitezell. The court, therefore, properly exercised its discretion in excluding evidence that would have served only to confuse the jury.

[8] Balliviero also maintains that he should have been permitted to introduce a promotional videotape for his company, Lloyd's Industries, in order to show that the company was not simply a sham enterprise but was a functioning corporation involved in legitimate business activities. This videotape was properly excluded since the defendant and two accountants had argued at length that the company was a legitimate and profitable enterprise. The tape would have been repetitive, and it was well within the court's discretion to exclude such cumulative evidence. Furthermore, the government never contended that this business was a sham operation. In fact, it was Balliviero's operation of a legitimate business that made him so attractive to the drug smugglers who initially contacted him.

[9] The court's refusal to show another videotape, a television interview with one of Balliviero's employees, is also challenged here. P.M. Magazine produced an interview with Nancy Mann, who was employed as the only female crew boat operator on the river. Mann had testified that she was with Balliviero until 10:30 p.m. on the night of April 19th. Balliviero argues that the introduction of this tape was important to bolster his credibility by showing that the meeting which Balliviero had with Mann was strictly a business affair. The government had attempted to impeach Mann's credibility by suggesting that the two were lovers. However, since the government proof shows that defendant arrived at the offloading site after midnight, his actions until 10:30 p.m. are irrelevant. The court below properly concluded that this tape was irrelevant and would only introduce extraneous matters that would confuse the jury.

[10] Balliviero also asserts that the court below committed error by prohibiting him from calling the homicide detective who investigated the murder of Ralph Jackson. He sought to introduce photographs of the murder scene and the victim's body. The defendant contends that his testimony that Jackson was killed before repaying a substantial debt to Hindelang demonstrates that Hindelang had both the motive and opportunity to have Jackson killed. Hindelang's cooperation with the government, he contends, was an attempt to minimize the possibility that the government would investigate his involvement in the murder. The court ruled that the photographs were both irrelevant and prejudicial. That ruling was entirely proper. Balliviero was permitted to weave his theory about Hindelang's participation in the murder. The photographs not only fail to strengthen the inference that Hindelang murdered Jackson, but also are highly prejudicial.

[11] Next, Balliviero argues that the trial court improperly denied access to the transcript of Hindelang's sentence reduction hearing. In that hearing, Hindelang allegedly implicated a number of other persons. Defendant asserts that he should have had a chance to review these names and verify the claim that they were involved in marijuana smuggling. What Balliviero is suggesting is that he should have had an opportunity to, in effect, try each individual against whom Hindelang cooperated so as to permit the jury to weigh credibility. The district judg committed no error in refusing to permit Balliviero to start on this ridiculous fishing expedition. Not only is this information irrelevant to defendant's case, but it would clearly have confused the jury and wrongly prejudiced the government's case.

[12] In addition, Balliviero maintains that he should have been permitted to utilize the transcript to determine whether any additional promises were made to Hindelang. This

would have permitted a stronger attack on his credibility, in defendant's estimation. The government points out that the material in the transcript concerned on-going investigations. If the court had permitted the use of this transcript, the prejudice to the government's on-going investigations unrelated to the Balliviero case would have been substantial. Furthermore, a day and one-half of cross-examination had permitted defendant to extensively challenge the credibility of this witness.

[13] It appears that defendant misperceives the thrust of the doctrine established in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). A defendant cannot simply allege the presence of favorable material and win reversal of his conviction. As this Circuit noted in Ogle v. Estelle, 641 F.2d 1122 (5th Cir. 1981)

> The United States Supreme Court held in Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963), that

> suppression by the prosecutor of evidence favorable to an accused when the accused has specifically requested the evidence violates due process "where the evidence is material either to guilt or to punishment." The holdings of this Court establish that a defendant seeking to establish a Brady violation must prove the following: (1) the prosecution's suppression of evidence; (2) the favorable character of the suppressed evidence for the defense; and (3) the materiality of the suppressed evidence.

641 F.2d at 1124.

[14] In the same vein, Balliviero challenges the court's refusal to permit him to view the pre-sentence investigation report made in connection with Hindelang's plea agreement. The basis for this argument is that the report is important for the purposes of cross-examination and impeachment. The court denied this request, citing Rule 32(c) of the Federal Rules of Criminal Procedure, which requires that the strictest of confidentiality be afforded information provided by a defendant to a probation officer.

Although defendant charges that the court failed to review the report for possible Brady material, the record clearly demonstrates that such a review was conducted. Record on Appeal, vol. 5, at 108-09. His refusal to permit defendant to view the report is tantamount to a statement that there was no Brady evidence in the report. The judge, therefore, committed no error when he made the challenged ruling.

[15, 16] Finally, Balliviero contends that the evidence is insufficient to support his conviction because the government failed to prove that he obtained "substantial income" from his part in the marijuana smuggling operation. This is untrue. The government introduced undisputed evidence that the drug operations in which Balliviero participated netted more than 350,000 pounds of marijuana, valued at $225.00 a pound. The government also elicited testimony that Balliviero's share of the profits from his operation was twenty percent. Viewing, as we must, the evidence in

the lightmost favorable to the prosecution, we are called upon to judge whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Since circumstantial evidence may serve to prove the receipt of substantial income, United States v. Phillips, 664 F.2d 971, 1035 (5th Cir. 1981), we must hold that the government did prove that Balliviero obtained substantial income from this smuggling venture.

[17] For the above-stated reasons, the conviction of Lloyd Ballivier is affirmed.[3]

AFFIRMED.

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[3]Although we affirm defendant's conviction, we also grant defendant's motion to strike page 23 of the government's appellate brief. Defendant's comments about guilt made at the sentencing hearing are certainly not relevant to this appeal, which considers the fairness of his trial. We stress the impropriety of inclusion of these statements in the government's brief.